SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 7
Justice

COACH, INC.,

Plaintiff,

- against -

GATEWAY ENTERPRISES, INC. and LJG CONSTRUCTION, LLC,

Defendants.

INDEX NO. 110278/08

MOTION SEQ. NO. 004

The following papers were read on this motion by plaintiff to strike defendants' answer.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits (Memo)	4, 5
Replying Affidavits (Reply Memo)	6

Cross-Motion: ☐ Yes ☒ No

Before the Court is a motion by Coach, Inc. (plaintiff) seeking an Order striking Gateway Enterprises, Inc. (Gateway) and LJG Construction, LLC's (LJG) (collectively, defendants) answer and suppressing the defendants' affirmative defenses by reason of the spoliation of relevant and material evidence, namely stain-soaked gloves and rags, or in the alternative (a) requiring the imposition of corrective relief at trial, including the preclusion of proof favorable to LJG, including any testimony or other evidence regarding the removal of the rags and gloves from the roof deck, to restore balance; (b) assessing costs against LJG and/or (c) imposing an adverse inference charge due to LJG's spoliation of evidence. Defendants are in opposition to the motion. Discovery in this matter is complete and the Note of Issue was filed on January 11, 2012.

BACKGROUND

This is a partial subrogation action which arises from a May 24, 2007 fire on the rooftop deck of plaintiff's corporate headquarters located at 516 West 34th Street, New York, New York (the property) when the wood decking and wood furniture were in the process of being stained.

Plaintiff seeks to recover monies paid out for the property loss suffered from the fire. It is undisputed that the fire originated in the trash can on the rooftop deck. The dispute in this matter relates to the cause of the fire.

Plaintiff proffers that LJG's position on the cause of the fire is that plaintiff's employees, shown on the rooftop video surveillance standing near the trash can at approximately 3:08 p.m., disposed of a lit cigarette or cigarettes into the trash can and that said cigarette(s) caused the fire seen on the video about two and a half hours later (Plaintiff's Affirmation [Aff.] in Support at ¶ 3). Plaintiff disputes LJG's hypothesis of the cause of the fire as not scientifically possible given the timeline of the video, and intends to present expert testimony at trial demonstrating that the only plausible cause of the fire was the spontaneous combustion of linseed oil-laden rags and gloves placed in the trash can by LJG workers (*id.*). LJG contends that its workers deny placing any used rags in the trash can after being advised to leave the building as they were not authorized to do the work by plaintiff's facilities personnel. Plaintiff proffers that LJG maintains that all used rags were preserved in a water-filled container until sometime in late 2009 or early 2010, when LJG moved its garage from Maspeth to another location on Metropolitan Avenue in Brooklyn, New York.

In opposition LJG claims that the used rags were only preserved until July of 2008, at which time LJG moved its garage. Further, it is undisputed that there was a video surveillance camera that recorded the activities on the roof the day of the fire. LJG also proffers that the parties do not dispute that there was an investigation by the members of the Bureau of Fire Investigation of the NYC Fire Department (NYFD) and Arson and Explosion Squad of the New York Police Department (NYPD), who issued two separate written reports regarding the cause of the fire (*see* Opposition, exhibits B and C). Upon a review of the NYPD report, the cause of the fire was "deemed accidental (related to a discarded cigarette)" (Opposition, exhibit C). LJG further notes that the NYFD concluded in its report that "the time frame is consistent with a fire

started by smoldering cigarette" and also notes that "[t]he investigating team did not witness any stain soaked rags being thrown into garbage" (Opposition, exhibit B).

Furthermore, LJG argues that on the evening of the fire, Robert Gueli (Gueli), General Manager of LJG and Gateway, and the LJG employee who worked on the roof on the day of the fire went to the building met with fire department personnel and plaintiff's personnel and viewed the surveillance footage. LJG employees who were involved in the job were also interviewed by the Fire Marshall. Gueli states that he left the meeting with the impression that it was being determined that LJG personnel had no involvement relating to the fire and the cause of the fire was cigarettes that were thrown into the garbage can (see Opposition, Gueli Affidavit). By letter dated May 25, 2007, Gueli wrote a letter to his insurance broker informing him of the occurrence of the fire. In the letter he also stated his impression, after reviewing the surveillance footage and various correspondence with employees and the NYFD, that the NYFD was to determine that Gateway and LJG personnel had no involvement relating to the cause of the fire (Opposition, exhibit E). He also states that the fire appears to have started in a paper filled rubberized trash container as a result of someone throwing out a cigarette (*id.*). Gueli states that he was never told to preserve the rags and gloves from the date of the accident and believed from that point forward LJG was exonerated from any liability stemming from the fire.

The instant action was commenced by the filing of a summons and complaint on July 28, 2008, and issue was joined on August 13, 2008 when the defendants interposed their answer. On or about October 6, 2011, counsel for plaintiff served a Combined Notice for Discovery & Inspection on LJG which specifically requests in Item No. 40 to make available for inspection "all physical evidence relevant to the Incident" (*id.* at 9; exhibits F and G). In its response to Item No. 40 of plaintiff's Combined Demands, LJG stated that "[a]ll physical evidence is believed to be in possession of the landlord's representatives, COACH's

representatives or at the various agencies of New York City involved in the investigation of the fire" (*id.* at exhibit G). Plaintiff proffers that at depositions, LJG's employees testified that the used rags and gloves which were removed from the roof and taken back to LJG's garage in Maspeth, New York and preserved in a container filled with water[1] were discarded (*see* Plaintiff's Aff. in Support, exhibits I-K), and that this testimony is adverse to the response to Item No. 40. Furthermore, it is plaintiff's position that the disposal and non-preservation of the used rags and gloves after LJG knew of the fire that occurred on plaintiff's rooftop presents a crucial issue in the case as it is the basis of LJG's alleged defense from liability. It is on the grounds of the alleged negligent disposal of the used rags and gloves that plaintiff brings the herein motion based on spoliation.

STANDARD

"A party seeking a sanction pursuant to CPLR 3126 such as preclusion or dismissal is required to demonstrate that 'a litigant, intentionally or negligently, dispose[d] of crucial items of evidence . . . before the adversary ha[d] an opportunity to inspect them'" (*Kirschen v Marino*, 16 AD3d 555, 555-556 [2d Dept 2005], quoting *Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]), "thus depriving the party seeking a sanction of the means of proving his claim or defense. The gravamen of this burden is a showing of prejudice" (*Kirschen,* 16 AD3d at 556). "When a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation, or, at the very least, preclude that party from offering evidence as to the destroyed product" (*Squitieri v City of New York*, 248 AD2d 201, 202 [1st Dept 1998] [internal citation and quotation omitted], *but see Hall v Elrac, Inc.*, 79 AD3d 427, 428 [1st Dept 2010]

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[1] Plaintiff states that the placement of the used rags and gloves in a water-filled container is a necessary measure to prevent the possibility of spontaneous combustion that commonly results from the improper handling of materials soaked in linseed oil-based finishes (Plaintiff Aff. in Support at ¶ 4).

["Absent proof that the destruction of the vehicle was willful, contumacious or in bad faith, the court properly declined to impose the drastic sanction of striking defendant's answer and, instead, deferred the issue of the appropriate sanction for spoliation of evidence to trial"]). "Although originally defined as the intentional destruction of evidence arising out of a party's bad faith, the law concerning spoliation has been extended to the nonintentional destruction of evidence" (*Kirkland*, 236 AD2d at 173).

DISCUSSION

Plaintiff, in its motion, charges that "LJG's disposal of used rags and gloves constitutes the spoliation of [material, relevant, and] important evidence" (Plaintiff Affirm. in Support, ¶ 14). Further, plaintiff states that "[p]roof of the whereabouts of the rags and gloves after the fire presents a crucial issue in the case. If LJG could present the used rags and gloves at trial, such evidence might tend to reinforce the anticipated testimony of its employees that they removed all of the used rags and gloves from the site before the fire" (Memorandum [Memo.] of Law in Support, pg. 2). LJG's failure to produce the rags and gloves would allegedly undermine the testimony of its employees as well as its theory that the fire could not have been caused by the spontaneous combustion of the rags (*id.*). As a result, plaintiff seeks to strike defendants' answer and suppress their affirmative defenses by reason of the spoliation, or in the alternative (a) requiring the imposition of corrective relief at trial, including the preclusion of proof favorable to LJG, including any testimony or other evidence regarding the removal of the rags and gloves from the roof deck, to restore balance; (b) assessing costs against LJG and/or (c) imposing an adverse inference charge due to LJG's spoliation of evidence.

There is a dispute between the parties as to when LJG disposed of the used rags and gloves. Plaintiff maintains that the rags were disposed of in late 2009 or early 2010, which would be after the commencement of the herein lawsuit and after LJG was on notice to preserve relevant evidence. Specifically, plaintiff points to a letter addressed to Gueli, dated

June 10, 2008, before the complaint in this action was filed, putting him on notice that a lawsuit was going to be filed against LJG and Gateway stemming from the fire (Aff. in Support, exhibit C). This letter also mentions that the surveillance video showed defendant employees discarding used rags into an open trash can which ignited later that day. Plaintiff also points to the deposition testimony of one of LJG's employees, who was working on the deck the day of the fire, wherein he testified on February 9, 2011 that the used rags were disposed of at the time the garage was moved about a year prior to the deposition, placing the disposal of the rags at approximately February of 2010 (Aff. in Support, exhibit H). Plaintiff also points to Gueli's deposition on January 21, 2011, wherein he testified that they moved to a new garage a year-and-a-half to two years before his deposition, which places the move and the time the rags were discarded to approximately late 2009, early 2010 (*id.* at K).

However, LJG claims that the used rags were only preserved until August 8, 2008, which would be before this action was commenced and allegedly before there was an obligation to preserve the rags. At no time since the action was commenced, according to LJG, did plaintiff ever specifically seek the production of the rags in question, despite numerous written demands for other items in question. Furthermore, LJG argues that the issue of spoliation of the rags did not come up until the eve of trial in this matter, during the pre-trial conference before Justice Silver on December 3, 2012. Regardless, LJG proffers that the used rags are not relevant evidence since the NYFD and NYPD already concluded in their reports that the cause of the fire was a smouldering cigarette. Further, the used rags at issue would not be key evidence, rather key evidence would be traces of stained rags and gloves from the remnant of the fire or the surveillance video which captured the rooftop activities the day of the fire (Opposition, ¶ 22-23). Even if the rags were produced, it would have no bearing on the outcome of this case as plaintiff fails to demonstrate how it was prejudiced by the destruction of the evidence.

The Court finds that there is no evidence that LJG acted willfully, contumaciously, or in bad faith in discarding the used rags from the garage. The record does not demonstrate that the loss of the used rags and gloves will severely prejudice the prosecution of plaintiff's case (*see Favish v Tepler*, 294 AD2d 396, 397 [2d Dept 2002] ["The record does not demonstrate that the loss of the [evidence] will fatally compromise the defense (compare *Kirkland v New York City Hous. Auth.*, supra at 176, 666 N.Y.S.2d 609) or leave the defendants without the means to defend the action (compare *DiDomenico v. C & S Aeromatik Supplies*, 252 A.D.2d at 53, 682 N.Y.S.2d 452)"]). Plaintiff even admits in its memorandum of law,

> "[i]f LJG produced the used rags and gloves and convinced the jury that they were used by its workers on the day of the fire, that evidence may have some persuasive force but would hardly be conclusive. A question would remain as to whether all the rags were removed. Thus, the production of some rags and gloves would not foreclose the possibility that at least other rags and gloves were thrown in the trash can – a fact that LJG attempts to refute but is established by the video" (Plaintiff, Memo. of Law, pg. 2-3, footnote 1).

Examination of the subject used rags would not be critical in determining the cause of the fire, specifically in light of the fact that there is surveillance video footage which captured the events the day of the fire as well as the investigative reports from the NYFD and the NYPD. Additionally, the fact that plaintiff waited until the pre-trial conference in this matter to bring up the issue of spoliation, nearly eleven months after the Note of Issue and Certificate of Readiness were filed, belies its claim that the used rags are key evidence. Specifically, the Court notes that the Certificate of Readiness filed by plaintiff on January 11, 2012 states "Discovery proceedings now known to be necessary [are] completed," and that "there are no outstanding requests for discovery." Although plaintiff now points to its Combined Notice for Discovery & Inspection, served on LJG on or about October 6, 2011, wherein plaintiff requested all physical evidence relevant to the fire, this issue was not pursued prior to filing the Note Of Issue and as such is deemed waived (*see Rivera-Irby v City of New York*, 71 AD3d 482 [1st

Dept 2010]; *Melcher v City of New York*, 38 AD3d 376, 377 [1st Dept 2007] ["Plaintiff, however, waived her right to further disclosure when she filed her note of issue and certificate of readiness, which stated both that disclosure was complete and that there were no outstanding disclosure requests"]). As such, the herein motion is denied.

The Court now turns to plaintiff's alternative request for an adverse inference charge due to spoliation of evidence. Although plaintiff's requested relief to strike the defendants' answer and affirmative defenses is not warranted under these circumstances, the discarded used rags and gloves are clearly relevant to the issue of whether LJG took all of their rags and gloves with them from the rooftop on the day of the fire which provides a full defense to liability. Accordingly, it is within the trial Court's discretion to render any appropriate charge regarding a negative inference, if any, to be drawn at the discarding of the used rags and gloves for LJG's garage, though this Court declines to do so at this juncture (*see Rivera-Irby*, 71 AD3d at 483).

CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that the motion by plaintiff Coach, Inc. to strike defendants Gateway Enterprises, Inc. and LJG Construction, LLC's answers and suppressing defendants' affirmative defenses is denied; it is further,

ORDERED that counsel for defendants are directed to serve a copy of this Order with Notice of Entry upon the plaintiff.

ORDERED that the Clerk of the Court shall ~~enter judgment accordingly~~.

This constitutes the decision and order of the Court.

Dated: 11/19/13

FILED
DEC 02 2013
COUNTY CLERK'S OFFICE
NEW YORK

PAUL WOOTEN, J.S.C.

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